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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-711

WESTERN AIR LINES, INC.,
Petitioner,

v.

CONTINENTAL AIR LINES, INC.,
Respondent.

BRIEF FOR RESPONDENT CONTINENTAL AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT CONTINENTAL AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Continental Air Lines, Inc. (Continental) submits this brief in opposition to the petition of Western Air Lines, Inc. (Western) for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit for review of that court's decision and judgment in *Continental Air Lines, Inc.* v. *Civil Aeronautics Board*, Case No. 74-1651, entered on September 22, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, review of which Western seeks, is printed in Appendix A accompanying Western's petition before this Court and is reported at 519 F.2d 944 (D.C. Cir. 1975).[1]

RESPONSE TO PETITIONER'S STATEMENT OF QUESTIONS PRESENTED

This is an airline route case which began in 1967, in which the Civil Aeronautics Board twice refused to certificate a carrier to compete with Western between San Diego and Denver, after two evidentiary hearings in which an independent Bureau of the Board had urged and the Administrative Law Judge had found that the market required and would support competitive service, and that Continental should be selected to provide it.

Continental sought review in the Court of Appeals for the District of Columbia. The Department of Justice declined to represent the Board on appeal, and filed an amicus brief for the United States supporting Continental's appeal. The Court of Appeals reversed and remanded the case to the Board on the grounds that the Board's findings were not supported by substantial evidence of record. The Board has sought neither reconsideration nor this Court's review, and has cited the court's decision with approval in a subsequent order.

The case presents no issue which should command this Court's attention. There is no conflict between

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[1] References to the Court of Appeals opinion will be to the appendix to Western's petition, cited as "Appendix." References to the record will be to the Joint Appendix filed with the Court of Appeals, cited as "JA".

circuits. The decision of the Court of Appeals is not inconsistent with the prior decisions of this Court. Its interpretation of the Federal Aviation Act is neither novel nor erroneous, illustrates no judicial "activism," involves no usurpation of the Board's administrative function, and gives rise to no dire consequences. Thus, none of the questions which Western poses in its petition is legitimately presented by the opinion below, and Western's petition should be denied.

STATEMENT

A concise statement of the case, containing the facts material to the consideration of the questions raised by Western, is contained in the opinion of the Court of Appeals. Appendix, pp. 4a-13a. The statement of the case offered by Western is misleading in a number of respects which will be discussed in the argument. For the convenience of the Court, Continental will here set out a brief summary of the history of this proceeding.

This case arose out of a proceeding that began in 1967 for the purpose of providing improved service between San Diego and each of four cities to the east: Chicago, Denver, New York and Washington. The Board has since certificated competitive nonstop service in all of those markets except San Diego-Denver.

The San Diego-Denver market has been the subject of two separate administrative proceedings, with full evidentiary hearings, briefs to the Administrative Law Judge, Initial Decisions by the Administrative Law Judge, briefs to the Board, oral argument before the Board and requests for Board reconsideration.

Twice the Board's independent Bureau of Operating Rights and the Administrative Law Judge recom-

mended the certification of Continental as a competitor with Western in the San Diego-Denver market. Twice a bare majority of the Board, over vigorous dissents, decided to maintain Western's monopoly.

The second administrative hearing was occasioned by the Board's discovery of an error in its first opinion. On April 16, 1971, the Board *sua sponte* issued an order on remand, withdrawing its original profit and loss forecast and substituting a new one which showed a loss of only $1,000 for Western in the first year of competition. Order 71-4-112; J.A. 79. The Board said that "Western's financial result would range from a slightly below breakeven to a somewhat profitable one" in 1971 and found that:

> "The revised figures render extremely close the balance of decisional criteria—harm to Western under existing economic conditions weighed against public benefit factors favoring competition and improved beyond service—in determining whether such competition should be authorized." *Id.*, p. 1; J.A. 79.

After a second hearing, the Administrative Law Judge issued a detailed decision in which he found that (1) Western's service was not responsive to the public need; (2) Western and Continental could compete profitably in this strong and growing market; and (3) Continental should be selected to compete with Western because of its superior service benefits and low fares. Supplemental Initial Decision, March 20, 1972; J.A. 526.

In a 3 to 2 decision, the Board acknowledged that the San Diego-Denver route "offers a potential for future certification of competition," but again refused to au-

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thorize competitive service. Order 72-12-29; J.A. 83. The Board based its decision, not on an analysis of the particular market or evidence in the case, but on the majority's generalized assertion that "during a period of lagging traffic growth . . . we must be more than unusually careful to avoid impeding the industry's opportunities for full recovery." *Id.,* p. 2; J.A. 85. Unlike its earlier decision, the Board's opinion after remand contained no profit and loss estimate for either Continental or Western, and said nothing about the benefits of competition. It did not discuss the "balance of decisional criteria" it had identified in its remand order.

Fifteen months later, the Board issued its opinion on reconsideration. Order 74-5-17; J.A. 100. That opinion reiterated the Board's earlier premise for decision, namely that:

> "The industry continues to falter in its attempts to make the financial recovery which our policy of caution was designed to assist. This fortifies our resolve to avoid making unnecessary awards of competitive authority on routes which are adequately served." *Id.*, p. 2; J.A. 101.

Although it reaffirmed its decision to keep the Denver-San Diego market a monopoly for Western, the Board finally had to concede that "the data which has become available since the original decision was reached now tends to indicate the prospects for profitable competitive operations are far stronger than earlier believed," and that "competitive service would be more profitable than originally anticipated . . . ." *Id.,* pp. 8, 13; J.A. 107, 112.

However, the Board then announced that its original decision "did not turn on profitability." *Id.* p. 10;

J.A. 109. The Board provided no explanation for this statement, nor did it ever address the "balance of decisional criteria" it had identified in its order on remand.

Continental appealed the Board's decision to the United States Court of Appeals for the District of Columbia Circuit in accordance with Section 1006(b) of the Federal Aviation Act, 49 U.S.C. § 1486(b). Continental argued: (1) that the Board had failed to observe the mandate of Section 102(d) of the Act requiring the Board to consider "competition to the extent necessary . . ." as an element in determining the public interest; (2) that the Board had not adequately explained the reason for its decision to keep a monopoly in the San Diego-Denver market, particularly in view of its admission that competition would be profitable; and (3) that there was no substantial evidence of record to support the Board's rationale that so-called "industry conditions" compelled the maintenance of a monopoly in the San Diego-Denver market.

The court found it necessary to address the statutory provision respecting "competition to the extent necessary . . ." because both Board counsel and Western had argued that the provision was of no particular significance (a position contrary to the Board's prior decisions), and in any event was overshadowed by other statutory considerations. Appendix, pp. 14a-15a.

The court interpreted the statute in the same manner as had the Board itself in a long and consistent line of cases stretching over 30 years.[2] While Western seeks to create the impression that the court ordered

[2] These Board decisions are identified in the court's opinion. Appendix, pp. 17a-19a.

the Board to authorize competition in every case, the court's holding speaks for itself:

> "... there is no presumption in favor of competition *per se* because competition may prove uneconomical and destructive of the healthy development of the industry if the relevant market is too small to support competing carriers. But when sufficient traffic exists to support competition, certification of competing carriers is mandated by the Act as providing the best means of effectuating the other public interest goals contained in § 102." Appendix, p. 19a, footnote omitted.

The court reviewed the Board's own construction of Section 102, and pointed out that the Board "has from the outset [of the Act] consistently taken that position." *Id.*, p. 20a.

The court then proceeded to examine the Board's opinions in order to determine "whether there is substantial evidence indicating that the San Diego-Denver market lacks sufficient traffic potential for healthy competition or that another public interest consideration outweighs the significant benefits afforded by competition." *Id.*, pp. 20a-21a.

After reviewing the Board opinions, the court, quoting from this Court's opinion in the *Permian Basin* case, concluded that:

> "Section 102 sets forth six public interest factors to guide the CAB in the exercise of its statutory duties. We are cognizant that in reviewing agency orders '[t]he courts' responsibility is not to supplant the [Board's] balance of these interests with one more nearly to its liking,' but the state of the record establishes that the Board recited the public benefits to be derived from competition, and did not itself accord them any real weight in the

> balance, dismissing them, in effect, as overborne by considerations, of the health of the industry and the fuel situation, which lacked any support in substantial evidence." *Id.*, pp. 29-30a, footnote omitted.

The court remanded the case to the Board, noted that it was commenced 8½ years earlier and Western's position that "[p]ublic policy dictates that the case be brought to an end," and requested that the Board proceed expeditiously on remand with the selection of a competing carrier. *Id.*, p. 30a. However, the court indicated that if the Board should desire a modification of this mandate in order to take further evidence on the question of competitive service, the Board should set forth "with particularity" the matters to be dealt with in further hearings. *Id.*

On the question of selecting a competing carrier, the court said that it was up to the Board either to affirm the Administrative Law Judge's decision or to make its own selection, setting forth its reasons for doing so. *Id.*, p. 31a.

On November 25, 1975, the Court of Appeals granted Western's motion to stay the issuance of the court's mandate pending review by this Court. The Board has taken no action.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

There are no special or important reasons for this Court to review the instant case on writ of certiorari and the writ should not be granted. The decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter, nor has the Court of Appeals decided a federal question in a manner conflicting with applicable decisions of this Court.

1. The Court of Appeals' Interpretation of the Federal Aviation Act Is Neither Novel Nor Erroneous

Western's argument to this Court is largely a repetition of its argument to the Court of Appeals. Essentially, Western asserts that this Court should review this case to "provide guidance" to the Board and the Court of Appeals with respect to what it contends is a novel and erroneous interpretation of the Federal Aviation Act by the Court of Appeals. Petition, pp. 7, 19.

The short answer to Western's argument is that the court's interpretation of the statute is the same as the Board's own interpretation under which it has functioned successfully for 38 years. The Board does not need further "guidance" on this matter and, indeed, has not sought it.

In what it concedes is a "tedious" discussion of the subject (Petition, p. 17), Western contends that the Board's interpretation of the pro-competitive mandate in Section 102(d) has ebbed and flowed over the years in tune with general economic cycles (Petition, pp. 11-18). Western bases this contention on a recitation of the history of the Board's practices over the years in setting down new route cases. From this Western concludes that the Board has been more inclined to institute new route cases during periods of carrier prosperity.

Whether the Board's history supports Western's generalization is beside the point. The policy followed by the Board during a particular period with respect to its own docket is a different matter than the Board's interpretation of the pro-competitive mandate of the statute. The latter has not varied with economic conditions. For example, during the 1970-1971 recession

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the Board reaffirmed its long-held view of its competitive mandate:

> "One of our principal policies has been that the traveling public is entitled to the benefits of competition whenever it is justified by existing and projected market traffic. We have stated that major markets require competition regardless of the quality of service provided by monopoly carriers."[3]

Even more recently the Board held that in an air transport system "enjoined to preserve '[c]ompetition to the extent necessary . . .,' the Board prefers to trust in competition, rather than monopoly, as the agent of change."[4]

The Board's interpretation of its statutory competitive mandate is expressed in decisions rendered during every economic and political climate.[5] In an early case the Board held that the statute creates a "strong, although not conclusive, presumption in favor of competition on any route which offers sufficient traffic to support competitive services without unreasonable increase of total operating costs."[6] Compare the Board's interpretation with that by the court in this case:

> "The legislative history and the early CAB decisions indicate that there is no presumption in favor of competition *per se* because competition

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[3] *Domestic Passenger Fare Investigation,* Order 71-4-54, April 9, 1971, p. 27.

[4] *Express Service Investigation,* Order 73-12-36, December 7, 1973, p. 33.

[5] Examples of these cases are found in the court's opinion, Appendix, pp. 17a-20a.

[6] *Colonial Airlines, Inc., Atlantic Seaboard Operation,* 4 CAB 552, 555 (1944).

> may prove uneconomical and destructive of the healthy development of the industry if the relevant market is too small to support competing carriers. But when sufficient traffic exists to support competition, certification of competing carriers is mandated by the Act as providing the best means of effectuating the other public interest goals contained in § 102." Appendix, p. 19a.

Not only has the court adopted the same interpretation of the statute as that consistently followed by the Board, but in a decision issued *after* the court rendered its opinion the Board reaffirmed that interpretation and indicated its agreement with the court's opinion:

> "As the Board has often observed and as the courts have recently emphasized, the Act requires the Board to foster competition as a means of enhancing the development of air transportation on routes which can support competing carriers—except where the benefits of competition are outweighed by other public interest considerations. See *Continental Air Lines* v. *CAB*, C.A.D.C., No. 74-1651, September 22, 1975." [7]

Thus, Western's attempt to portray the court's interpretation as an aberration is belied by the Board's stated agreement with that interpretation. The only aberration was the Board's decision in this case—a decision which the Board now recognizes was in error.

Having stated its agreement with the court's interpretation of the statute as being identical to its own long-held view, the Board has put to rest Western's contention that the court's decision would force radical changes in the Board's docketing of cases and the par-

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[7] *Remanded Reno-Portland/Seattle Nonstop Service Investigation,* Order 75-11-45, November 12, 1975, p. 5.

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ties' burden of proof in competitive airline route proceedings.

There is no basis whatever for Western's dire predictions of administrative chaos. The Board has been acting under the same statutory interpretation for 38 years, and has found no difficulty in establishing priorities and exercising control over its docket. Similarly, the burden of proof in competitive airline route cases has always been and will continue to be on those seeking to show that a particular route can support competitive service. It is only "when sufficient traffic exists to support competition, [that] certification of competing carriers is mandated by the Act" (Appendix, p. 19a), unless, in the Board's words quoted above, "the benefits of competition are outweighed by other public interest considerations." In this case, Continental met that burden of proof. The Board's error was that, while agreeing that competition would be viable, it attempted to avoid competition by reference to so-called "industry" factors of no demonstrated relevance to the market at issue and which had no support in substantial evidence.

Western also is wrong in asserting that the District of Columbia Circuit is alone in recognizing the Board's statutory competitive mandate. For example, in *Northeast Airlines, Inc.* v. *CAB,* the First Circuit held that:

> "Two needs are involved: the physical need—for seats to carry the traffic and the statutory need for competition as a stimulus to provide good service to the public and to develop a sound air transportation system."[8]

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[8] 331 F.2d 579, 588 (1964).

Inasmuch as the Board and the courts agree that the Board has a statutory responsibility to foster sound competition, as being in the public interest, no conflict exists for this Court to resolve.

2. The Court Did Not Encroach Upon the Board's Administrative Functions

Western's second line of attack is that the Court of Appeals (1) substituted its judgment for that of the Board and (2) attempted to dictate the Board's decision on remand, contrary to this Court's holding in *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

The best answer to this argument is to read the decision of the Court of Appeals. Upon reviewing the Board's opinions, the court found that the Board's stated reasons for rejecting competition in this case were not supported by substantial evidence. Appendix, pp. 29a-30a. Clearly, a review of the record to determine whether the agency's findings are supported by substantial evidence is a legitimate function of a reviewing court. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962).

Since the Board had admitted in its order on reconsideration that competition in the San Diego-Denver market would be profitable, and since the Board's stated reasons for rejecting competition had no support in the record, the court remanded the case to the Board. Appendix, p. 30a.

Nothing in the court's remand constituted improper interference with the agency's responsibility. Noting that the case had consumed 8½ years and had been the subject of two full evidentiary hearings, the court agreed with Western that "[p]ublic policy dictates

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that the case be brought to an end." The court therefore directed that the Board "proceed expeditiously on remand with the selection of a competing nonstop carrier." *Id.*

Western is offended by the fact that the Court of Appeals found that "[t]he record before us contains ample evidence of the need for competing non-stop service" (Appendix, p. 30a). See Petition, p. 20. The court was simply, and quite properly, drawing its own inference from the record. *Commissioner* v. *Scottish American Investment Co.*, 323 U.S. 119, 124 (1944). However, this inference did not bind the Board. Even though there was no substantial evidence in the record to support the Board's decision that competitive service is not required in this market, the Board was given the option to take further evidence on the issue of competitive service.

Similarly, nothing that the Court of Appeals did with respect to carrier selection conflicts with the *Pottsville* case. In *Pottsville,* the Court of Appeals had issued a writ of mandamus to the FCC, directing the FCC to hear on remand only the application of the Pottsville Broadcasting Company. 309 U.S. at 140. Speaking for this Court, Mr. Justice Frankfurter said that the Court of Appeals could not "write the principle of priority into the statute. . . ." *Id.* at 145. In this case the Court of Appeals made no attempt to limit the Board's choice of a carrier on remand. The Board was left free either to adopt or reject the decision of the Administrative Law Judge selecting Continental. Appendix, p. 31a.

The court simply required the Board to discharge its statutory duty and to do so expeditiously. The court

was not telling the Board *how* to exercise its discretion but only that the discretion in fact *be exercised* and *be supported* with cogent reasons. *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 622-23 (1944), *reh. den.*, 323 U.S. 809 (1944).

However, the court also said that if the Board wished to take additional evidence, the Board should petition the court for modification of the mandate, setting forth "with particularity" the matters to be dealt with in a third evidentiary hearing. Appendix, p. 31a. This was the only limitation the court placed on the Board. The decision whether to ask for a modification of the mandate in order to take additional evidence was left to the Board.

Clearly, the court has the power to issue reasonable instructions on remand to the Board. Section 1006(d) of the Federal Aviation Act, 49 U.S.C. § 1486(d), gives the Court of Appeals: ". . . exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. . . ." Moreover, the court's instructions were clearly reasonable.

Given the fact that this 8½-year-old case had gone through two full administrative hearings, the court was justified in asking the Board to support whatever request it might make for a third such hearing. *Ford Motor Company* v. *NLRB*, 305 U.S. 364, 374 (1939); *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 655 (1954).

Moreover, the history of this case before the Board clearly justified the court's requiring the Board to identify in advance the issues to be dealt with in a third hearing. In its remand order following the first hearing, the Board had seemed to specify the issues to be

resolved in the remanded hearing. It identified the "decisional criteria—harm to Western under existing economic conditions weighed against public benefit factors favoring competition and improved beyond service. . . ." Order 71-4-112; J.A. 79. It then proceeded in its subsequent orders to ignore those criteria and base its decision on factors not explored in the hearing. The court's requirement is calculated to prevent a recurrence of this departure from reasoned decision-making.

The remand instructions given by the Court of Appeals in this case are in no way similar to the court's pervasive mandate struck down by this Court in *NLRB* v. *Food Store Employees Union, Local 347*,[9] on which Western relies. Petition, pp. 22-23. In the *Food Store Employees* case, the court modified and enlarged on an NLRB order and directed that the union be reimbursed for organizational and litigation costs.

In this case, the court merely directed the Board to act expeditiously. The Board is free to take additional evidence if it first identifies to the court the issues which it wishes to explore in a further hearing. Nothing in the court's opinion suggests that such a hearing would be denied if the issues were first identified by the Board. Appendix, p. 30a. The Board is also free to select a competing carrier of its choice. Western is guilty of proffering sheer speculation in "assuming" that the court "will take further steps to impose its will on the agency." Petition, p. 23. The court has taken no such "steps," nor is there any indication that it will do so. The Board has not indicated that it wishes to take additional evidence. If it does, there is no in-

[9] 417 U.S. 1 (1974).

dication that the court will not permit it to do so. Western's predictions that the court will interfere with the Board's prerogatives hardly furnishes a basis for review before such interference has occurred.

Finally, Western argues: "At the very least, the reservation in the court of power to approve or disapprove of the hearings brings powerful pressures on the Board to comply with the Court's wishes." Petition, p. 23. Indeed it does, and well it should; for all that the court wishes is an expeditious disposition of this case in accordance with the evidence of record. On the face of it, it would appear that two hearings and nine years are enough. If the Board concludes that further hearings are necessary, it is required to set forth "with particularity" the issues to be considered and their relevance to the statutory standards, in order "[t]o avoid any unnecessary delay." Appendix, p. 30a.

It was Western which argued in its brief to the Court of Appeals that "[p]ublic policy dictates that the case be brought to an end." However, it then was urging affirmance of a decision which would have perpetuated its monopoly. That decision having been reversed, Western now attempts through this petition or through a third evidentiary hearing further to protract this litigation and thus preserve that monopoly for at least a few more months or years.

In sum, what the Court of Appeals did here was to "lay bare" the Board's error of law in failing to observe its statutory public interest mandate. *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952), *reh. den.*, 344 U.S. 910 (1952). The court searched the Board's findings for substantial evidence to support the Board's findings and found none. *Burlington Truck Lines* v. *U.S., supra.* It then remanded the case to the Board

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for a decision in accordance with the statute and consistent with substantial evidence of record. *Ford Motor Co.* v. *NLRB, supra.* While arguably the court could have made a final decision of its own, in order to bring this long controversy to an end "without further delay," [10] it remanded the case to the Board to allow the Board to "enforce[e] the legislative policy committed to its charge." *FCC* v. *Pottsville Broadcasting Co., supra,* 309 U.S. at 145.

3. The Court of Appeals Has Not Departed from the Accepted and Usual Course of Judicial Proceedings, and There Is No Occasion for the Exercise of This Court's Power of Supervision

Western's final appeal is that this Court review not the decision in this case, but the alleged "judicial activism" of the D.C. Circuit in reviewing the actions of administrative agencies. Western attributes to the D.C. Circuit a "'partnership' theory" under which "the court on review is entitled to substitute its judgment for that of the agency. . . ." Petition, p. 29. It suggests that "[t]he time is ripe for the Supreme Court to exercise its power of supervision," because "[i]t is obvious that court burden and delay will increase as the court injects itself more and more into its 'partnership' with the agencies." *Id.*, p. 31.

Western's argument is not only specious; it is brazenly inappropriate in its criticism of particular judges. The Court of Appeals has not departed from the usual course of judicial proceedings. Specifically, neither in this case, nor in the prior cases cited by Western as examples of judicial "activism," has the D.C. Circuit substituted its judgment for that of the

[10] *FTC* v. *Curtis Publishing Co.*, 260 U.S. 568, 580 (1923).

agency or exceeded the permissible limits of judicial review. Nothing in the decision below calls for the exercise of this Court's power of supervision.

Ironically, Western finds the roots of the D.C. Circuit's "new 'activism'" in *Niagara Mohawk Power Corp.* v. *FPC*,[11] and in *Greater Boston Television Corp.* v. *FCC*[12]—both cases in which the D.C. Circuit affirmed agency action and the latter one which this Court declined to review on certiorari. Neither of these cases asserted the proposition that the court was entitled to substitute its judgment for that of the agency.

Western is fearful of the implications of the court's use of the terms "partnership,"[13] and "constructive co-operation"[14] to describe the relationship between administrative agencies and reviewing courts. Western's alarm comes somewhat late. In 1939 Mr. Justice Stone observed:

> "Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action."[15]

Similarly, Mr. Justice Frankfurter observed in 1941 that administrative agencies and courts are "collabora-

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[11] 379 F.2d 153 (D.C. Cir. 1967).

[12] 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[13] *Id.*, at 851.

[14] *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 648 (D.C. Cir. 1973).

[15] *United States* v. *Morgan*, 307 U.S. 183, 191 (1939).

tive instrumentalities of justice,"[16] and spoke in 1943 of "accommodating relationships between the judiciary and administrative agencies."[17]

The idea that the concept of "partnership" means that the court on review is entitled to substitute its judgment for that of the agency is Western's invention, not that of the D.C. Circuit. In fact, that court's view is diametrically opposite. As it stated in *Greater Boston*: "If the agency has not shirked this fundamental task [of reasoned decision-making] the court exercises restraint and affirms the agency's action even though the court would on its own account have made different findings or adopted different standards. . . . The process thus combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a 'partnership' in furtherance of the public interest, and are 'collaborative instrumentalities of justice.'"[18]

Moreover, it appears that the District of Columbia Circuit not only advocates judicial restraint, but practices it. A recent study indicates that in 1974 the circuit courts and other intermediate courts reviewed 506 agency actions, of which 330 or 65% were affirmed. The District of Columbia Circuit decided approximately 20% of the total, 101 out of 506 cases, and affirmed in 63% of the cases—approximately the same rate of affirmance as the average of all circuit and intermediate courts. The District of Columbia Circuit

[16] *United States* v. *Morgan*, 313 U.S. 409, 422 (1941).

[17] *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 622 (1944).

[18] *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851-52 (1970).

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affirmed a larger proportion of the administrative cases which it considered than did the First Circuit, the Third Circuit, the Fourth Circuit, the Eighth Circuit, or the Tenth Circuit.[19]

Contrary to Western's suggestion, the greater than average caseload of administrative cases borne by the District of Columbia Circuit is not the result of that court's "judicial activism," but the result of geography and statutes. As Mr. Justice Brennan observed in his tribute to Judge Bazelon in a recent volume of the *Georgetown Law Journal*:

> "Moreover, the District of Columbia courts have traditionally played a unique role in the resolution of public law questions of nationwide importance. In part because Congress has often made no other forum available, and in part because interests of convenience so direct, much of the litigation brought by and against the federal government is heard in the District of Columbia courts."[20]

It is obvious that a review of this case would have no effect on the caseload of the Circuit Court for the District of Columbia, or of the federal appellate courts generally.

CONCLUSION

It will be apparent from the foregoing discussion that there are no novel or serious issues posed by this case which warrant this Court's time and attention. There are no special and important reasons for its review on writ of certiorari. This is a simple airline

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[19] Gardner, *Federal Courts and Agencies: An Audit of the Partnership Books*, 75 Colum. L. Rev. 800, 805 (1975).

[20] 63 Geo. L. J. 1 (1974).

route case, which is unique only in the inordinate length of time which the Board spent in deciding it.

The case is now in its ninth year. Seven years have passed since the first hearing, in which the Administrative Law Judge determined that the San Diego-Denver market required and could support competitive service, and that Continental's selection would bring the greatest benefits to passengers in that market and in beyond markets which would receive improved service to San Diego. Public policy indeed dictates that the case be brought to an end. The decision of the Court of Appeals is calculated to bring it to an end as expeditiously as the Board can do so. The Board has indicated its agreement with the court's decision.

WHEREFORE, Respondent respectfully requests that the writ of certiorari be denied.

Respectfully submitted,

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